

## NOTICES OF EXEMPT RULEMAKING

The Administrative Procedure Act requires the *Register* publication of the rules adopted by the state's agencies under an exemption from all or part of the Administrative Procedure Act. Some of these rules are exempted by A.R.S. §§ 41-1005 or 41-1057; other rules are exempted by other statutes; rules of the Corporation Commission are exempt from Attorney General review pursuant to a court decision as determined by the Corporation Commission.

### NOTICE OF EXEMPT RULEMAKING

#### TITLE 3. AGRICULTURE

#### CHAPTER 9. DEPARTMENT OF AGRICULTURE AGRICULTURAL COUNCILS AND COMMISSIONS

*Editor's Note: The following Notice of Exempt Rulemaking is exempt from Laws 2010, Ch. 287, § 18. (See the text of § 18 on page 2287.)*

[R10-162]

#### PREAMBLE

- 1. Sections Affected**

Article 6	<b><u>Rulemaking Action</u></b>
R3-9-601	New Article
R3-9-602	New Section
R3-9-603	New Section
R3-9-604	New Section
R3-9-605	New Section
R3-9-606	New Section
- 2. The specific statutory authority for the rulemaking, including the authorizing statute (general), the implementing statute (specific), and the statute or session law authorizing the exemption:**

Authorizing statute: A.R.S. § 3-414(C)(9)  
Implementing statute: A.R.S. § 3-404(B)(7)  
Exemption: A.R.S. § 41-1005(A)(15)
- 3. The effective date of the rule:**

October 28, 2010
- 4. A list of all previous notices appearing in the *Register* addressing the exempt rule:**

Notice of Agency Guidance Document: 15 A.A.R. 1106, June 26, 2009
- 5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name:	Casey Cullings
Address:	Arizona Department of Agriculture 1688 W. Adams St. Phoenix, AZ 85007
Telephone:	(602) 542-0962
Fax:	(602) 542-5420
E-mail:	casey.cullings@azag.gov
- 6. An explanation of the rule, including the agency's reasons for initiating the rules:**

The Leafy Green Marketing Committee administers and enforces the Arizona Leafy Green Products Shipper Marketing Agreement. This marketing agreement requires shippers of leafy green vegetables who are signatories to the agreement to follow best practices with respect to the handling of those products in order to enhance food safety and prevent the outbreak of illnesses stemming from the consumption of leafy green vegetables. The marketing agreement, along with service mark usage guidelines signed by each signatory, sets out that signatories may use the Leafy Green Marketing Committee's collective service mark as long as they are in compliance with the best practices. When a signatory commits a flagrant or repeated violation of the best practices, the signatory loses the privilege to use the service mark for a period of time. The Marketing Committee has policies in place concerning violations of the

Notices of Exempt Rulemaking

best practices. This exempt rulemaking puts these current policies into rule and supplements them. This exempt rulemaking also includes portions of the marketing agreement and service mark usage guidelines signed by each signatory for the purpose of adding clarity and completeness to the other rules.

Section R3-9-601 sets out definitions. Most of these definitions come from the marketing agreement. The definition of best practices lists the specific leafy green best practices document adopted by the Marketing Committee.

Section R3-9-602 sets out signatories' duties to comply with the best practices and the marketing agreement. These requirements come from Article VI, Sections A and B and Article VII of the marketing agreement. Section R3-9-602 also clarifies that if the best practices require a SOP, the signatory must have and must follow the SOP.

Section R3-9-603 governs how signatories may use the Marketing Committee's service mark. These requirements come from the service mark usage guidelines.

Section R3-9-604 incorporates and supplements Article VI, Section C of the marketing agreement. For example, subsections (A)(2)-(4) makes clear that in addition to failing to follow the best practices, failure to use the mark properly, failure to pay assessments, and withdrawing from the marketing agreement also result in the loss of the privilege to use the service mark. Subsection (E) adds that two weeks of any suspension of the privilege to use the service mark must occur between December 1 and March 31. The purpose of this requirement is so that the suspension occurs when companies actually want to use the service mark as opposed to the off season. Subsection (H) explains how a signatory can regain the privilege to use the service mark when the signatory has lost the privilege due to failure to pay assessments. Subsection (I) makes clear that the Marketing Committee may publish a list of signatories that have lost the privilege to use the mark.

Section R3-9-605 puts into rule and supplements the Marketing Committee's guidance document on violation levels. Subsection (A) makes clear that there are four types of violations of the best practices: flagrant violations, major deviations, minor deviations and minor infractions. Subsection (B) defines flagrant violation. It uses the definition in the marketing agreement, but then limits its scope to make clear that minor issues will not be considered flagrant. Subsection (B)(3) gives the Marketing Committee discretion to elevate a major deviation to a flagrant violation based on the circumstances of the violation. Subsection (C) defines major deviation, and subsection (D) gives examples of violations that will be considered at least major deviations and possibly flagrant violations. As set out in subsection (E), the list in subsection (D) is not all-inclusive and any violation that meets the definitions in subsection (B) or (C) will be a flagrant violation or major deviation. The work health practices program referred to in subsection (D)(4)(f) comes from issue 10.1 of the best practices. The Compliance Plan referred to in subsection (D)(4)(g) comes from issue 2.1 of the best practices. Subsection (D)(6) is included because the auditors are certified by USDA, and the USDA will not allow its certified auditors to be used unless certain violations are treated seriously. Conditions considered an automatic unsatisfactory by USDA include immediate food safety risks presented when produce is grown, processed, packed or held under conditions that promote or cause the produce to become contaminated; the presence of rodents or an excessive amount of other pests in the produce during packing, processing or storage; employee practices (personal or hygienic) that have or may jeopardize the safety of the produce; falsification of records; failure to have a documented food safety program; and failure to have a designated person to oversee the food safety program. Subsection (H) describes how minor deviations and infractions may be elevated to major deviations. Subsection (I) defines "repeated violation" as used in the marketing agreement as a repeated major deviation.

Section R3-9-606 sets out the requirement to prepare and complete a corrective action plan when violations of the best practices are found.

- 7. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

None

- 8. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable

- 9. The summary of the economic, small business, and consumer impact, if applicable:**

Not applicable

- 10. A description of the changes between the proposed rule, including supplemental notices, and final rule (if applicable):**

Not applicable

- 11. A summary of the comments made regarding the rule and the agency response to them, if applicable:**

Shelly Tunis questioned the use of the word "producer" in R3-9-602(C) during the Committee's October 14, 2010 meeting. The Committee revised the language of the subsection to clarify the rule and removed the word "producer."

- 12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

Notices of Exempt Rulemaking

The Leafy Green Marketing Committee is independent from the Office of the Governor and therefore does not need prior written permission for this exempt rulemaking under Laws 2009, 3rd Spec. Sess., Ch. 7, § 28 and Laws 2010, 2nd Reg. Sess., Ch. 287, § 18. Additionally, this exempt rulemaking is not subject to paragraph A of Laws 2009, 3rd Spec. Sess., Ch. 7, § 28 and Laws 2010, 2nd Reg. Sess., Ch. 287, § 18 because this exempt rulemaking is intended to prevent a threat to the public health and is exempt from the rulemaking requirements of Title 41, Chapter 6 under A.R.S. § 41-1005.

**13. Any material incorporated by reference and its location in the text:**

None

**14. Whether the rule was previously made as an emergency rule and, if so, whether the text was changed between the making as an emergency and the making of the exempt rule:**

No

**15. The full text of the rule follows:**

**TITLE 3. AGRICULTURE**

**CHAPTER 9. DEPARTMENT OF AGRICULTURE  
AGRICULTURAL COUNCILS AND COMMISSIONS**

**ARTICLE 6. LEAFY GREEN MARKETING COMMITTEE**

Section

<u>R3-9-601.</u>	<u>Definitions</u>
<u>R3-9-602.</u>	<u>Best Practices: LGMA Compliance</u>
<u>R3-9-603.</u>	<u>Service Mark Usage</u>
<u>R3-9-604.</u>	<u>Loss of Use of Service Mark</u>
<u>R3-9-605.</u>	<u>Violation Levels: Repeated Violations</u>
<u>R3-9-606.</u>	<u>Corrective Action Plans</u>

**ARTICLE 6. LEAFY GREEN MARKETING COMMITTEE**

**R3-9-601. Definitions**

“Act” means A.R.S. Title 3, Chapter 3, Article 1.

“Auditor” or “Inspector” means a state or federal agricultural regulatory agency or its designee, or a private entity contracted by the Marketing Committee to perform inspections authorized by the Act.

“Best practices” means the “Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens: Version 4 – Arizona” dated August 1, 2010. This document is incorporated by reference, does not include any later amendments or editions, and is available for review online at <http://www.azlgma.gov/members/resources.asp> and at the Arizona Department of Agriculture, 1688 W. Adams St., Phoenix, Arizona 85007.

“LGMA” or “Marketing Agreement” means the Arizona Leafy Green Products Shipper Marketing Agreement dated August 29, 2007 that was approved pursuant to the Act.

“Marketing Committee” means the Marketing Committee established pursuant to the Marketing Agreement.

“Signatory” means a shipper who has signed the Marketing Agreement.

“SOP” means standard operating procedure.

**R3-9-602. Best Practices: LGMA Compliance**

- A.** Signatories shall comply with the best practices, maintain a trace-back system, file with the Marketing Committee reports as are periodically required, and be subject to periodic inspection by an auditor.
- B.** Signatories shall only buy, consign, or otherwise accept or handle leafy green products from a shipper or producer who is in compliance with the best practices, maintains a trace-back system, files with the Marketing Committee reports as are periodically required, and is subject to periodic inspection by an auditor.
- C.** When the best practices require a SOP, there must be an appropriate SOP and that SOP must be followed.

**R3-9-603. Service Mark Usage**

- A.** The Marketing Committee may establish a service mark that identifies a signatory as a member in good standing of the LGMA.
- B.** A signatory’s compliance with the LGMA and R3-9-602 is a condition precedent and subsequent to the signatory’s privilege to use the service mark.
- C.** An authorized signatory shall use the service mark on all bills of lading and may use the service mark on other documents.

Notices of Exempt Rulemaking

**D. A signatory shall:**

1. Use the service mark without reference to a private brand or label.
2. Provide reasonable assurances that the signatory has a system in place to comply with this Section, maintain records sufficient to audit the system for the duration of the LGMA, and make those records available to the Marketing Committee upon request.

**E. A signatory shall not:**

1. Use the service mark on packaging or product or as a certification mark to certify product.
2. Use the service mark as the signatory's own mark or as the exclusive representation of its business entity.
3. Insert within or overlap the boundaries of the service mark with the signatory's name or trademark.
4. Alter the service mark in any way other than proportionately adjusting the size of the service mark.

**R3-9-604. Loss of Use of Service Mark**

**A. A signatory will lose the privilege to use the service mark if the signatory:**

1. Commits a flagrant violation or repeated major deviation;
2. Fails to comply with R3-9-603;
3. Has not paid assessments due for the prior fiscal year; or
4. Withdraws from participation in the LGMA pursuant to Article XII, Section B of the LGMA.

**B. The first flagrant violation or repeated major deviation will result in a two-week suspension of the privilege to use the service mark.**

**C. A flagrant violation or repeated major deviation following the first flagrant violation or repeated major deviation will result in a suspension of the privilege to use the service mark for two weeks or until the signatory has established and implemented a corrective action plan approved by the auditor and the Marketing Committee, whichever is longer.**

**D. A flagrant violation or repeated major deviation following a suspension pursuant to subsection (C) will result in an indefinite revocation of the privilege to use the service mark. The privilege to use the service mark will not be restored to the signatory for a minimum of two years unless the signatory demonstrates to the satisfaction of the auditor and the Marketing Committee a significant change in management and brand.**

**E. At least two weeks of any suspension of the privilege to use the service mark under this Section must occur between December 1 and March 31.**

**F. The Marketing Committee may accelerate the progression of penalties under this Section if the signatory's product seriously affects a person's health and the signatory handled the product with intentional, knowing or reckless disregard for the signatory's obligations under the LGMA and best practices.**

**G. A signatory will not lose the privilege to use the service mark under subsections (A)(1) and (2) without an opportunity for a hearing under A.R.S. Title 41, Chapter 6, Article 10, except if the Marketing Committee finds that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, the Marketing Committee may order summary suspension of a signatory's privilege to use the service mark.**

**H. A signatory that loses the privilege to use the mark under subsection (A)(3) must pay all assessments due from prior fiscal years, including penalties and interest, before regaining the privilege to use the service mark.**

**I. The Marketing Committee may publish a list of signatories whose privilege to use the service mark has been suspended.**

**R3-9-605. Violation Levels: Repeated Violations**

**A. Violations of the LGMA and R3-9-602 fall into four levels: flagrant violations, major deviations, minor deviations, and minor infractions. The Marketing Committee or its designee shall determine the level of a violation consistent with this Section.**

**B. A flagrant violation occurs when a signatory buys, consigns, or otherwise accepts or handles a leafy green product and knows or should have known the product was grown, packed, shipped, processed or handled in violation of R3-9-602 and the violation:**

1. Significantly increases the risk of delivering unsafe product into commerce;
2. Affects the integrity of the LGMA's food safety program; or
3. In the Marketing Committee's judgment, merits more serious treatment than a major deviation based on the consideration of, as relevant:
  - a. The position of the employee responsible for the violation.
  - b. Whether the employee responsible for the violation knowingly committed the violation.
  - c. The circumstances surrounding the violation.
  - d. Whether the signatory took prompt corrective action.
  - e. Whether the signatory has committed the same or a similar violation previously, and
  - f. Any other relevant facts.

**C. A major deviation is a violation of R3-9-602 that may inhibit the maintenance of food safety, but that does not necessarily result in unsafe product.**

**D. The following violations constitute at least major deviations and are potentially flagrant violations:**

1. Falsification of any record for any reason;

Notices of Exempt Rulemaking

2. Spitting in the field;
3. Unclean sanitation facilities, including the presence of soiled toilet paper;
4. Failure to:
  - a. Properly wash hands after using a restroom or returning to the field;
  - b. Follow the best practices with respect to feces or fecal matter found in the field;
  - c. Follow the best practices with respect to the use of compost or animal manure, including creating and maintaining proper records related to that use;
  - d. Have a trace-back system;
  - e. Sanitize gloves and knives;
  - f. Follow a work health practices program concerning the transfer of human pathogens by workers; or
  - g. Provide a Compliance Plan, as defined in the best practices, to an auditor;
5. Refusing an audit; and
6. Conditions for which an automatic "unsatisfactory" would be assessed by USDA if performing a GAP/GHP audit.
- E.** Violations constituting flagrant violations or major deviations are not limited to those listed in subsection (D).
- F.** A minor deviation is a violation of R3-9-602 that the signatory can correct within five business days of the audit and that does not necessarily increase the risk of a food borne illness.
- G.** A minor infraction is a violation of R3-9-602 that the signatory corrects before the auditor leaves the audited premises and that does not necessarily increase the risk of a food borne illness.
- H.** The Marketing Committee or its designee may assess a signatory with a major deviation if an auditor discovers several minor deviations or minor infractions of the same type or if a signatory fails to timely submit a corrective action plan.
- I.** A repeated violation under the LGMA and this Article only occurs when the violations at issue are major deviations. Repeated violations are limited to violations occurring during the current and prior fiscal year.

**R3-9-606. Corrective Action Plans**

- A.** A signatory who commits a flagrant violation, major deviation, or minor deviation must correct the violation and submit a corrective action plan to the Marketing Committee or its designee within five business days of receipt of the audit report noting the violation. If the Marketing Committee or its designee rejects the corrective action plan, the signatory has 24 hours to submit a revised corrective action plan.
- B.** In the case of a flagrant violation or major deviation, once the Marketing Committee or its designee accepts the signatory's corrective action plan, an auditor will perform an unannounced audit of the signatory within three business days.
- C.** The signatory shall comply with the corrective action plan.
- D.** Notwithstanding subsection (A), in the case of a violation that creates an immediate danger to public health, the signatory shall submit a correction action plan immediately and take necessary action to minimize the threat to public health.